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IN THE

Supreme Court of the United States

No. 79-1159

BENJAMIN E. POOL, as Administrator
The Estate of EDDIE B. PARKER, Deceased,
Petitioner,

versus

DOWNTOWN NURSING HOME, INC.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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TABLE OF CONTENTS

Table of Cases i

Statement of the Case 2

Argument 3

Conclusion 6

TABLE OF CASES

Code of Alabama, 1975, Section 6-5-410 2

28 U.S.C. Section 1257(3) 3

Cardinale v. State of Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969) 6

Central Vermont Railroad Company v. White, 35 S.Ct. 865, 238 U.S. 507, 57 L.Ed. 1433 (1915) 4

Seneca Nation of Indians v. Christy, 16 S.Ct. 828, 162 U.S. 283, 40 L.Ed. 970 (1968) 5

Wood v. Chesborough, 33 S.Ct. 706, 228 U.S. 672, 57 L.Ed. 1018 (1913) 4

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STATEMENT OF THE CASE

This wrongful death action was instituted in the state courts of Alabama under the Alabama Wrongful Death Statute. *Code of Alabama*, 1975, Section 6-5-410. The action was instituted by one who had not been duly appointed administrator of the estate of the deceased, Eddie B. Parker. After the limitations period of two years, which is provided in the Wrongful Death Statute had expired, the attorney for the plaintiff was appointed administrator of the estate of Eddie B. Parker, deceased, and attempted to correct the earlier deficiency by filing an amendment seeking his substitution as plaintiff in the action. The Supreme Court of Alabama ruled that an action brought by one other than the personal representative was a nullity under Alabama law. Therefore, since no action was brought properly within the two-year period which is a substantive part of the Alabama Wrongful Death Statute, any attempted amendment thereafter is to no avail. The Alabama Supreme Court followed its earlier decisions and directed the dismissal of this case.

No question was ever presented to a state court to the effect that any of the Alabama statutes or rules of procedure in question were repugnant to the United States Constitution.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI IS DUE TO BE DENIED BECAUSE NO FEDERAL QUESTION IS PRESENTED.

This case involves the interpretation of the Alabama Wrongful Death Statute and the relation of the Alabama Rules of Civil Procedure thereto. This case does not involve in any way a Federal question, nor an allegation that a state statute conflicts or is repugnant to the Constitution of the United States, treaties or laws of the United States. Therefore, under 28 U.S.C. Section 1257(3), the Petition for Writ of Certiorari is due to be denied.

One essential issue in the state court's decision was whether someone other than the personal administrator can institute an action for wrongful death. This was decided adversely to the petitioner in this case. In the state court proceeding, the petitioner realized this error and filed an amendment substituting the personal representative of the deceased after the two-year limitations period of the wrongful death statute had run. The state court held that the limitations period applying to the Alabama wrongful death action is a part of the substantive cause of action and is therefore, a period after which the remedy expires. Ample authority was cited in the Alabama Supreme Court's opinion supporting this ruling. The Alabama Supreme Court rejected the petitioner's argument that the Alabama Rules of Civil Procedure operated to allow this amendment. This was purely a matter of interpretation of the Alabama

Wrongful Death Statute and the Alabama Rules of Civil Procedure.

For the first time in support of this petition, the petitioner alleges that the ruling by the Alabama Supreme Court is contrary to the Fourteenth Amendment of the United States Constitution. That mere allegation does not create a Federal question. In fact, this Honorable Court has held:

> " . . . that there are many cases illustrating the power of the states over the pleadings and practice in their courts, and the right to prescribe within what time and upon what conditions suits can be commenced and maintained." Citations omitted. *Wood v. Chesborough*, 33 S.Ct. 706, 228 U.S. 672, 57 L.Ed. 1018 (1913).

It has been recognized specifically in this Honorable Court that certain state statutes do, in giving the cause of action prescribe that the lapse of time may not only bar the remedy, but also destroy the liability. It has been held that:

> "In that class of cases, the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue." *Central Vermont Railroad Company v. White*, 35 S.Ct. 865, 238 U.S. 507, 57 L.Ed. 1433 (1915).

That case held without reservation that matters respecting the remedy — such as the form of the action, sufficiency of the pleadings, rules of evidence and the Statute of Limitations — depend upon the law of the place where the suit is brought.

A similar situation is presented in the case of *Seneca Nation of Indians v. Christy*, 16 S.Ct. 828, 162 U.S. 283, 40 L.Ed. 970 (1968) where review was denied because the state court based its decision on the statute granting the cause of action in holding that failure to bring the action within the time prescribed therein prevented the plaintiffs from maintaining the suit. It was held specifically in that case that no Federal question was presented, but rather it was simply one of requiring the plaintiffs to come within the terms of the state statute.

The cases cited herein clearly require the denial of this petition due to the fact that no Federal question is presented. This is merely an attempt by the petitioner to request this court to reverse what he feels is an erroneous decision by the Alabama Supreme Court of issues involving purely Alabama law.

II. THIS PETITION IS DUE TO BE DENIED BECAUSE NO FEDERAL QUESTION WAS PRESENTED TO THE STATE COURT.

A review of the record in the state court proceedings clearly reveals that the petitioner failed to allege at any time that any of the Alabama statutes or rules of procedure involved were repugnant to the United States Constitution. This argument was first made in support of

the Petition for Writ of Certiorari. In fact, an analysis of the petition reveals that the same arguments are being made in support of the petition which were made in the state court. These arguments do not attempt to relate the relief sought to denial of equal protection under the United States Constitution. No mention is ever made of how the Alabama Supreme Court's opinion deprives any citizen of equal protection of the laws. It is merely an effort to impose the petitioner's interpretation of the relation back rule on the Alabama Supreme Court which has already considered that argument and rejected it.

It cannot be questioned that the Supreme Court will not decide Federal constitutional issues raised for the first time on review of state court decisions. *Cardinale v. State of Louisiana*, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969). This failure to raise the constitutional question properly operates to further justify the denial of this Petition for Writ of Certiorari.

CONCLUSION

The petitioner for the first time in support of this Petition for Writ of Certiorari alleges a Federal question is presented. However, this question was not presented or argued in the state court. Moreover, the questions presented in the Petition for Writ of Certiorari do not involve Federal questions, but involve purely matters of state procedural and substantive law which are governed by the state courts. Due to these fatal errors, this Petition for Writ of Certiorari is due to be denied.